No. 18-96

IN THE

Supreme Court of the United States

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,

Petitioner,

v.

ZACKARY W. BLAIR, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICUS CURIAE* RETAIL LITIGATION CENTER, INC. IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. The *Granholm* Framework Determines The Validity Of Alcohol Regulations Under The Commerce Clause. 5

Step 1: Is there discrimination? 7

Step 2: Is the law authorized by the Twenty-first Amendment? 9

Step 3: Does the law advance a legitimate goal that cannot be served by nondiscriminatory alternatives? 13

II. Tennessee's Durational Residency Requirement Fails Under The *Granholm* Analysis 14

A. Discrimination 14

B. Immunity 16

C. Nondiscriminatory Alternatives 19

CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

Cases

44 Liquormart, Inc. v. Rhode Island,
517 U.S. 484 (1996).....5, 19

Bacchus Imports, Ltd. v. Dias,
468 U.S. 263 (1984).....5, 7, 8, 9, 11, 12, 16, 17

Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.,
476 U.S. 573 (1986).....6, 8, 10, 11

City of Philadelphia v. New Jersey,
437 U.S. 617 (1978).....7, 9

Cooper v. Tex. Alcoholic Beverage Comm'n,
820 F.3d 730 (5th Cir. 2016).....12

Craig v. Boren,
429 U.S. 190 (1976).....5, 19

Dep't of Revenue of Ky. v. Davis,
553 U.S. 328 (2008).....6

Granholm v. Heald,
544 U.S. 460 (2005).....*passim*

Halliburton Oil Well Cementing Co. v. Reily,
373 U.S. 64 (1963).....8

Healy v. Beer Inst.,
491 U.S. 324 (1989).....5, 8, 10

Lewis v. BT Inv. Managers, Inc.,
447 U.S. 27 (1980).....20

New Energy Co. of Indiana v. Limbach,
486 U.S. 269 (1988).....6, 13

North Dakota v. United States,
495 U.S. 423 (1990).....5, 6

Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of Or.,
511 U.S. 93 (1994).....2, 7

South Dakota v. Wayfair, Inc.,
138 S. Ct. 2080 (2018).....4

Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm'n,
313 F. Supp. 3d 751 (W.D. Tex. 2018).....23, 24

Constitutional Authorities

U.S. Const. amend. XXI .....*passim*

U.S. Const. art. 1, § 8, cl.3 .....*passim*

Statutes

Ariz. Rev. Stat. Ann. § 4-243(A) 18

Ark. Code Ann. § 3-2-103.....21

ch. 235 Ill. Comp. Stat. Ann. § 5/6-1.5.....18

ch. 235 Ill. Comp. Ill. Stat. § 5/6-4(a) 18

1989 Minn. Sess. Law Serv. 49.....24

Minn. Stat. Ann. § 340A.402 23

Minn. Stat. Ann. § 340A.412 .....21, 24

Minn. Stat. Ann. § 340A.414 24

Mont. Code Ann. § 16-4-1005 22

N.D. Cent. Code Ann. § 5-02-11.....23

N.J. Stat. Ann. § 33:1-25.....24

N.J. Stat. Ann. § 33:1-35.....24

N.Y. Alco. Bev. Cont. Law § 101(1) 18

N.Y. Alco. Bev. Cont. Law App. § 81.1 24

Neb. Rev. Stat. Ann. § 53-1,104.....23

Neb. Rev. Stat. Ann. § 53-169(1) 18

Neb. Rev. Stat. Ann. § 53-171.....18

Or. Rev. Stat. Ann. § 471.341 22

Tenn. Code Ann. § 57-3-204.....15, 20

Tenn. Code Ann. § 57-3-803.....21

Tenn. Code Ann. § 57-4-101.....18, 21

Tenn. Code Ann. § 57-4-102.....18, 21

Tenn. Code Ann. § 57-4-201.....18, 21

Tenn. Code Ann. § 57-5-103.....21

INTEREST OF *AMICUS CURIAE*[1]

The Retail Litigation Center, Inc. (RLC) is a public policy organization whose members include many of the country's largest and most innovative retailers. They employ millions of workers throughout the United States, furnish goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the practical consequences of pending cases. Since its founding in 2010, the RLC has participated as *amicus curiae* in more than 100 cases.

The RLC and its members have a significant interest in this case. Some RLC members sell liquor. As interstate retailers, they would be barred by Tennessee's durational residency law, and by others like it, if it were enforceable. More generally, RLC members have an interest in ensuring that the Commerce Clause continues to serve its crucial role as a bulwark against protectionism in all industries.

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[1] The parties have consented to the filing of this *amicus* brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than *amicus* and its counsel made a monetary contribution intended to fund the preparation or submission of the brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Tennessee's durational residency law keeps interstate retailers out of the alcohol trade based simply on where their owners, officers, directors, and stockholders live. The legislature could achieve every one of its purported public policy objectives in a host of nondiscriminatory ways. The real beneficiaries are the local retailers the law protects from competition.

Petitioner's response is not so much to dispute these points as to argue that they don't matter. On Petitioner's logic, the very act of asking whether protectionism is afoot goes too far: "A bar on protectionist laws would amount to reasonableness review," and such review "is irreconcilable" with the Twenty-first Amendment. Pet. Br. 43-44.

Petitioner is wrong. This Court has made clear that economic protectionism violates an overarching principle of constitutional law embodied in the Commerce Clause. Nondiscrimination is more than a fragile aspiration that gives way any time someone pours a drink. *See Granholm v. Heald*, 544 U.S. 460, 472 (2005) ("[S]tate laws violate the Commerce Clause if they mandate 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" (quoting *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of Or.*, 511 U.S. 93, 99 (1994)). Hence this Court's repeated rejection of claims that the Twenty-first Amendment renders concerns about protectionism irrelevant. *See id.* at 486-87 (holding that "the Twenty-first Amendment does

not supersede other provisions of the Constitution" and collecting cases).

In filing this *amicus* brief, the RLC seeks first and foremost to make a basic point: Petitioner's proposed approach to assessing the constitutionality of alcohol regulations is not simply novel, but would upend the framework the Court established in *Granholm*. That three-step test asks first whether the regulation discriminates; if so, whether that discrimination is protected by the Twenty-first Amendment; and finally, whether the state could have pursued its goals in nondiscriminatory ways. *See id.* at 472, 476, 489. The Court carefully tailored this framework to reflect the Commerce Clause's commitment to interstate competition free from discrimination as well as the Twenty-first Amendment's grant of regulatory authority to the states.

The laws at issue in *Granholm* were discriminatory under familiar Commerce Clause principles. They were not saved by the Twenty-first Amendment, and they pursued goals that could be advanced without discriminating against out-of-state interests. The same is true of Tennessee's durational residency law, as the Sixth Circuit properly concluded. *See* Pet. App. 33a.

Rather than taking *Granholm*'s framework on its own terms—which is fatal to Tennessee's residency law—Petitioner posits that the Commerce Clause simply has no application to retailers. *See* Pet. Br. 43-44. There is no warrant for Petitioner's cramped view. Like the cases that preceded it, *Granholm* harmonized the Commerce Clause with the Twenty-first

Amendment as a general matter, yielding an analysis that applies to discrimination against interstate *commerce*, not just interstate *products*. As this Court recognized last Term, *Granholm* reflects the importance of nondiscrimination as an enduring constitutional principle. *See South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2091 (2018) (citing *Granholm* as supporting the "virtually *per se*" rule for invalidating discriminatory laws).

The RLC's second reason for submitting this brief is to underscore an obvious reality, notwithstanding Petitioner's suggestions to the contrary: State residency has nothing to do with whether a retailer is a law-abiding member of, and valued contributor to, a local community. Interstate retailers can and do work hard to comply with drinking age laws. They can and do keep careful records for calculating and submitting taxes. They can and do invest in communities and hire local employees to staff their stores. Yet in Tennessee, none of that matters if their owners, officers, directors, and stockholders have not lived inside the state's borders for a long enough time. This protection of in-state sellers from interstate competition is not subtle; it is evident on the face of Tennessee's statute. Such discrimination is a paradigmatic violation of the Commerce Clause and in no way immunized by the Twenty-first Amendment. The latter authorizes states to regulate alcohol sales, not to prop up local interests by keeping competitors at bay.

ARGUMENT

I. The *Granholm* Framework Determines The Validity Of Alcohol Regulations Under The Commerce Clause.

This Court has evaluated the constitutionality of alcohol regulations on numerous occasions and in a range of contexts. *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (challenge under the First Amendment); *Craig v. Boren*, 429 U.S. 190 (1976) (challenge under the Equal Protection Clause). Included among those cases are several controversies over the consistency of alcohol-related laws with the Commerce Clause. *See, e.g., North Dakota v. United States*, 495 U.S. 423 (1990); *Healy v. Beer Inst.*, 491 U.S. 324 (1989); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). The Court's most recent discussion of that intersection is also its most extensive: *Granholm*, 544 U.S. 460.

Granholm dealt with laws in Michigan and New York that allowed in-state wineries to sell directly to consumers while making it illegal or impractical for out-of-state wineries to do so. The Court considered the same issue that animates this case: the relationship between the nondiscrimination principle of the Commerce Clause and state regulatory authority under the Twenty-first Amendment. It concluded that both interests could be served. Discriminatory laws violate the Commerce Clause even in the field of alcohol regulation. *See Granholm*, 544 U.S. at 489. At the same time, states possess extensive discretion to regulate the alcohol trade in nondiscriminatory ways, including by establishing a tiered system that divides

the operations of producers, wholesalers, and retailers. *See id.* As the Court has previously observed, the three-tier system allows states to pursue goals such as "promoting temperance, ensuring orderly market conditions, and raising revenue." *North Dakota*, 495 U.S. at 432.

Drawing on the body of Commerce Clause jurisprudence as well as the history of the Twenty-first Amendment, *Granholm* took a three-step approach to evaluating the laws at issue. The first question is whether a law discriminates against interstate commerce. *See* 544 U.S. at 472. If there is discrimination, the Court moves on to consider whether the law is saved by the Twenty-first Amendment. *See id.* at 476.[2] Finally, if the Twenty-first Amendment does not save the law, the Court asks whether the law nevertheless "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Id.* at 489 (quoting *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 278 (1988)).

Granholm's three-step analysis applies in full measure to cases like this one. The Court set forth a

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[2] *Granholm* did not have occasion to discuss the implications of finding that no discrimination is present, though this Court has indicated that "[w]hen ... a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds local ... benefits." *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986); *see also Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 353 (2008).

framework that safeguards interstate competition and forecloses economic protectionism while preserving states' discretion to regulate alcohol. Petitioner's response is to advance a revisionist account of *Granholm* based on snippets that mention out-of-state products, even as it ignores the framework the Court deliberately applied. In the sections that follow, we describe the full scope of this Court's controlling constitutional analysis.

Step 1: Is there discrimination?

Granholm begins by asking whether the laws at issue discriminated against out-of-state interests. *See* 544 U.S. at 472 ("Time and again this Court has held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" (quoting *Oregon Waste*, 511 U.S. at 99)). This is the threshold step—with respect to alcohol as well as other goods and services—because discriminatory laws "face 'a virtually *per se* rule of invalidity.'" *Id.* at 476 (quoting *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)); *see also Bacchus*, 468 U.S. at 268, 274-76. The path of the constitutional analysis depends in the first instance on whether discrimination is afoot.

The laws in *Granholm* were plainly discriminatory. In Michigan, only wineries within the state could ship directly to consumers. *See* 544 U.S. at 473-74. As for New York, in-state producers could ship directly to consumers, while out-of-state producers needed to open "a branch office and warehouse" within the

state. *Id.* at 474-75. That approach contravened the Court's "admonition that States cannot require an out-of-state firm 'to become a resident in order to compete on equal terms.'" *Id.* (quoting *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 72 (1963)).

While *Granholm* took discrimination as its starting point, Petitioner would have this Court ignore discrimination altogether. On Petitioner's telling, the "Twenty-first Amendment makes the dormant Commerce Clause inapplicable to most state laws regulating liquor distribution." Pet. Br. 24. Petitioner's claim is nothing more than old wine in new bottles. *Granholm* rejected it, instead broadly embracing the well-established premise that laws cannot "deprive citizens of their right to have access to the markets of other States on equal terms." 544 U.S. at 473. The Court affirmed that "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause," 544 U.S. at 487, with cites to *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, *Brown-Forman Distillers Corp.*, 476 U.S. 573, and *Healy*, 491 U.S. 324. It punctuated the point by quoting *Brown-Forman* for the proposition that "[w]hen a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry." 544 U.S. at 487 (quoting *Brown–Forman*, 476 U.S. at 579).

The discrimination inquiry comes first, because it shapes the ensuing analysis of whether a law is authorized by the Twenty-first Amendment. From the standpoint of the Commerce Clause, protectionism is

no less of a concern in the alcohol industry than it is in other domains.

Step 2: Is the law authorized by the Twenty-first Amendment?

After concluding that the laws at issue discriminated against out-of-state interests—and thus triggered the "virtually *per se* rule of invalidity"— the *Granholm* Court proceeded to consider whether they were immunized by the Twenty-first Amendment. 544 U.S. at 476 (quoting *City of Philadelphia*, 437 U.S. at 624).

In conducting that analysis, the Court began with history. It explained that the Twenty-first Amendment "restored to the States the powers they had under the Wilson and Webb-Kenyon Acts." *Id.* at 484. Those Acts expanded state regulatory authority over the alcohol industry, but they did not endorse or authorize protectionism. *See id.* at 483-84.

The Court also looked to its precedents, which emphasize the importance of vigilance against protectionism even in the alcohol trade. In *Bacchus*, the Court invalidated a tax that exempted certain locally produced beverages in Hawaii. In doing so, it rejected any suggestion that the Twenty-first Amendment served to "empower States to favor local liquor industries by erecting barriers to competition." 468 U.S. at 276. Likewise, the Court in *Brown-Forman* held that a New York law violated the Commerce Clause by effectively preventing distillers from running certain promotions outside of New York. This was itself a form of protectionism, for "[w]hile a State may seek

lower prices for its consumers, it may not insist that producers or consumers in other States surrender whatever competitive advantages they may possess." 476 U.S. at 580; *see also id.* ("Economic protectionism is not limited to attempts to convey advantages on local merchants; it may include attempts to give local consumers an advantage over consumers in other States.").

A few years after *Brown-Forman*, *Healy v. Beer Institute* struck down a Connecticut statute that required out-of-state beer shippers to affirm that their prices in Connecticut were no higher than their prices in neighboring states. *See* 491 U.S. at 326. The Court reasoned that while Connecticut has significant regulatory discretion over alcohol distribution, it may not "penaliz[e] Connecticut brewers if they seek border-state markets and out-of-state shippers if they choose to sell both in Connecticut and in a border State." *Id.* at 341. Punishing those who do business in other states is antithetical to the Commerce Clause, whatever the industry.

Based on its historical and doctrinal analysis, the Court in *Granholm* concluded that the discriminatory laws before it were not saved by the Twenty-first Amendment. That Amendment allows a state "which chooses to ban the sale and consumption of alcohol altogether" to "bar its importation." 544 U.S. at 488-89. It also allows states to "assume direct control of liquor distribution through state-run outlets or funnel sales through the three-tier system." *Id.* at 489. Even so, it is "well settled that the Twenty-first Amendment did not entirely remove state regulation of alcohol from the reach of the Commerce Clause." *Brown-Forman*,

476 U.S. at 584. The laws in Michigan and New York went too far by discriminating against out-of-state competitors.

Granholm is not alone in highlighting the salience of protectionism in cases involving alcohol. In *Bacchus*, the Court observed that "[s]tate laws that constitute mere economic protectionism are ... not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor." 468 U.S. at 276. The Sixth Circuit recognized this principle in the decision below, noting that the Commerce Clause "prevents 'economic protectionism'—*e.g.*, a state protecting in-state economic interests by burdening out-of-state economic interests." Pet. App. 28a. And Judge Sutton, who parted ways with the majority over some aspects of Tennessee's system, agreed that discriminatory laws are invalid if "they serve no purpose besides 'economic protectionism.'" Pet. App. 49a (quoting *Bacchus*, 468 U.S. at 276). That Petitioner will not accept even this fundamental point is both striking and indicative of the extreme position it has staked out. *See* Pet. Br. 43.

Petitioner thus takes upon itself the unenviable task of defending the power of states to enact protectionist laws. Any other approach, Petitioner maintains, would amount to "reasonableness review" that is inconsistent with the Twenty-first Amendment. Pet. Br. 43-44. This argument not only ignores the Court's long history of applying the nondiscrimination principle in a clear and rigorous fashion, but remarkably portrays economic protectionism as none of the judiciary's concern. *See* Pet. Br. 44 (contending that scrutinizing protectionist laws "would bog down

the courts in policy disputes and leave the states with little certainty as to the validity of their liquor laws"). That depiction, as explained above, is impossible to square with cases like *Granholm* and *Bacchus*.

Petitioner's response is to reimagine those cases. *See* Pet. Br. 43. Because *Granholm* and *Bacchus* involved "products," Petitioner concludes that the Court implicitly endorsed discrimination against out-of-state retailers. *See* Pet. Br. 41-44. But Petitioner has distilled the wrong lesson from this Court's cases. *Granholm* and *Bacchus* found discrimination against out-of-state interests to be unlawful, and they affirmed the significance of nondiscrimination as a constitutional principle. *See Granholm*, 544 U.S. at 472; *Bacchus*, 468 U.S. at 276. Nothing in those decisions supports Petitioner's claim that states have free rein to discriminate so long as they pick the right targets.

Further, *Granholm* expressly rejected an invitation to overrule *Bacchus* or limit the case to its facts. 544 U.S. at 488; *see also Cooper v. Tex. Alcoholic Beverage Comm'n*, 820 F.3d 730, 743 (5th Cir. 2016) (*Cooper II*) ("State regulations of the producer tier 'are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent.' ... But state regulations of the retailer and wholesaler tiers are not immune from Commerce Clause scrutiny just because they do not discriminate against out-of-state liquor." (quoting *Granholm*, 544 U.S. at 489)). In effect, Petitioner asks this Court to do what it has already refused in *Granholm*.

Step 3: Does the law advance a legitimate goal that cannot be served by nondiscriminatory alternatives?

Having determined that the discriminatory Michigan and New York laws were not excused by the Twenty-first Amendment, the *Granholm* Court turned finally to "whether either state regime 'advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.'" 544 U.S. at 489 (quoting *New Energy Co. of Ind.*, 486 U.S. at 278).

The main justifications offered by the states were "keeping alcohol out of the hands of minors and facilitating tax collection." *Id.* Neither withstood scrutiny. The argument about use by minors was undermined by the lack of evidence implicating direct shipments of wine. *See id.* at 490. There was also a problem of underinclusiveness: even with the laws in place, minors could order wine directly from in-state producers. *See id.* As for the tax-collection rationale, it had no purchase in Michigan, which already taxed out-of-state wineries for shipments made to in-state wholesalers and could extend that practice to direct shipments. *See id.* at 491. Similarly, New York could require out-of-state direct shippers to apply for a permit and submit sales data, which would facilitate orderly taxation. *See id.*

Ultimately, Michigan and New York fell short of the "exacting standard" they needed to satisfy in order to show that "nondiscriminatory alternatives will prove unworkable." *Id.* at 493.

Again placing itself in opposition to *Granholm*, Petitioner disputes the relevance of this inquiry into nondiscriminatory alternatives. It begrudgingly mentions the presence of nonprotectionist justifications "[t]o the extent it matters." Pet. Br. 47. Of course, as *Granholm* holds, it matters greatly. And as explained below, the absence of any such justifications for Tennessee's law confirms its invalidity.

II. Tennessee's Durational Residency Requirement Fails Under The *Granholm* Analysis.

A straightforward application of the *Granholm* framework demonstrates that Tennessee's durational residency requirement is invalid. Like every state, Tennessee possesses broad authority to regulate the distribution of alcohol, including through its implementation of the three-tier system. It has numerous avenues within that system to ensure that retailers doing business within its borders are complying with all applicable laws. But that is not a license to discriminate against interstate retailers or out-of-state interests, especially when the retail practices described below demonstrate that interstate retailers, operating in nondiscriminatory regulatory environments, are just as able to serve the reasonable objectives of alcohol oversight as their single-state counterparts.

A. Discrimination.

The Michigan laws at issue in *Granholm* allowed in-state wineries to ship directly to consumers while

foreclosing out-of-state wineries from doing the same. Discrimination was easy to discern. *See* 544 U.S. at 473-74. New York did not strictly bar out-of-state wineries from direct shipments; rather, it required them to set up an in-state distribution apparatus that in-state wineries could skip. *See id.* at 474. This, too, was discriminatory. *See id.*

Tennessee's residency requirement comes from the same mold. Under Tennessee law, it is not enough to set up a brick-and-mortar retail outlet within the state. To obtain the requisite liquor license, a would-be retailer must have lived within Tennessee for what the legislature deems to be a sufficient amount of time. Tenn. Code Ann. § 57-3-204(b)(2)(A) (establishing a two-year residency requirement for any individual seeking a retail liquor license). That residency period is even longer for a retailer seeking to renew its license. *Id.* (requiring ten years of residency prior to issuing a renewal). A *corporate* retailer must go still further, ensuring that all its officers, directors, and capital stockholders have lived in Tennessee for the requisite amount of time. *Id.* § 57-3-204(b)(3)(A)-(B), (D) (establishing a two-year residency requirement for any officer, director, or stockholder of a corporation seeking a retail liquor license).[3]

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[3] Petitioner has not defended the stockholder residency requirement or the extended residency requirement for renewals before this Court. *See* Pet. Cert. Reply 2. Nevertheless, those provisions are notable in illustrating the dramatic and onerous implications of Tennessee's regulatory approach for would-be entrants to its market.

The upshot of Tennessee's law is that if the owners, directors, officers, and stockholders of your organization have lived in Tennessee for a long enough time, you can establish a retail outlet there. If they haven't, you can't. As the Sixth Circuit explained, the law "prevents out-of-state residents from obtaining retail licenses and protects in-state residents who are retailers." Pet. App. 31a. That is the essence of discrimination.[4]

B. Immunity.

The next question is whether Tennessee's discriminatory law is saved by the Twenty-first Amendment. *See Granholm*, 544 U.S. at 476. Petitioner's position is that regulations governing retailers are

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[4] Aside from its discriminatory effect, there is also evidence that Tennessee's durational residency requirement was enacted with a discriminatory purpose. *Cf. Bacchus*, 468 U.S. at 270 (holding that "either discriminatory purpose ... or discriminatory effect" provide a basis for finding "economic protectionism" (citation omitted)). The Attorney General of Tennessee, for instance, suggested such a conclusion when he opined that the legislative history of a precursor provision "reveals no legitimate public policy ... and indeed provides some evidence that the legislative intent ... was to deter the sale of alcoholic beverages from outside Tennessee." Opp. App. 11a. In reaching that determination, the Attorney General pointed to evidence such as a floor debate in which a Tennessee legislator remarked that the Tennessee House had just voted "to kill interstate banking" and "all [the durational residency requirement] does is kill interstate whiskey." Opp. App. 9a. Given the procedural posture of this case, the Court of Appeals had no occasion to rule on discriminatory purpose. If this Court were inclined to reverse the discriminatory effect finding, however, it should remand to permit the lowers courts to develop the factual record as to discriminatory purpose.

somehow exempt from nondiscrimination principles, such that legislatures have carte blanche. *See* Pet. Br. 43-44. That theory runs headlong into *Granholm*, which set forth a framework for accommodating the Commerce Clause and the Twenty-first Amendment without any suggestion that retailing plays by an entirely different set of rules. *See supra* at 9-12.

The Sixth Circuit followed this Court's lead by considering the relationship between Tennessee's law and the scope of states' regulatory discretion over the alcohol industry. *See* Pet. App. 24a (citing *Bacchus*, 478 U.S. at 275-76). It concluded that the protectionist residency requirement is not immunized by the Twenty-first Amendment. The three-tier system of alcohol regulation might permissibly require that alcohol retailers have a physical presence within the state, the Sixth Circuit observed, but that is no warrant for durational residency requirements based on where owners, directors, officers, and stockholders live. Pet. App. 27a.

The Sixth Circuit's analysis coheres with this Court's recognition in *Bacchus* that "one thing is certain" when it comes to the Twenty-first Amendment: "The central purpose of the provision was not to empower States to favor local liquor industries by erecting barriers to competition." *Bacchus*, 468 U.S. at 276. It is likewise consistent with *Granholm*, which confirmed the validity of the three-tier system but drew the line at efforts to favor in-state interests. *See* 544 U.S. at 489.

The corollary is that invalidating Tennessee's discriminatory residency law would in no way challenge

the legitimacy of the three-tier system of regulation. States like Tennessee can still insist that producers sell to wholesalers, who sell to retailers, who sell to customers. *See Granholm*, 544 U.S. at 489 ("States may ... assume direct control of liquor distribution through state-run outlets or funnel sales through the three-tier system."). And they can establish separate licensing requirements at each stage. Numerous states maintain such a system without any residency requirements. *See, e.g.*, Neb. Rev. Stat. Ann. §§ 53-169(1), 53-171; Ariz. Rev. Stat. Ann. § 4-243(A); ch. 235 Ill. Comp. Stat. §§ 5/6-1.5, 5/6-4(a); N.Y. Alco. Bev. Cont. Law § 101(1). Indeed, Tennessee itself imposes no residency requirement whatsoever for permits to sell liquor by the drink in bars and restaurants for consumption on the premises. *See* Tenn. Code Ann. §§ 57-4-101, 102, 201. Other states allow businesses to satisfy their residency requirements by "incorporating or registering to do business in the State." Resp. Total Wine Br. 4-5 n.2; *see also id.* (noting that "[a]ffiliates of Total Wine are currently operating licensed retail package stores in many of the States that are claimed to have residency requirements, including Arizona, California, Georgia, Kentucky, Massachusetts, Missouri, North Carolina, South Carolina, Virginia, Washington, and Wisconsin").

What a state cannot do is condition eligibility to operate a retail shop on where owners, directors, officers, and stockholders live. The Twenty-first Amendment provides states with regulatory authority over the structure and operation of the alcohol trade. But it does not grant them permission to disre-

gard constitutional imperatives. Regulatory discretion does not excuse deprivations of free speech. *See 44 Liquormart*, 517 U.S. at 516 ("[T]he Twenty-first Amendment does not qualify the constitutional prohibition against laws abridging the freedom of speech embodied in the First Amendment."). It does not excuse denials of equal protection. *See Craig v. Boren*, 429 U.S. at 209 ("[T]he Twenty-first Amendment does not alter the application of equal protection standards that otherwise govern this case."). And it does not excuse economic discrimination against people who live in other states. *See Granholm*, 544 U.S. at 487 ("[T]he Court has held that state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause."). The Sixth Circuit put the point well: Tennessee "is not merely regulating the distribution of alcohol within its borders—it is dictating who can and cannot engage in its economy" based on where people live. Pet. App. 17a n.5.

C. Nondiscriminatory Alternatives.

The final question is whether, notwithstanding its discriminatory character, Tennessee's residency requirement serves a legitimate local purpose that cannot be advanced through nondiscriminatory means. *See Granholm*, 544 U.S. at 489.

The jumping-off point is Tennessee's own (belated) description of its objectives,[5] which stresses the importance of "oversight, control, and

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[5] As Respondent Total Wine notes, the legislative statement of intent was added two decades after Tennessee enacted a durational residency requirement. *See* Resp. Total Wine Br. 8.

accountability." Tenn. Code Ann. § 57-3-204(b)(4). The residency requirement, the argument runs, fosters these goals because "those who better know a community better serve it," Pet. Br. 49, and because resident retailers are easier to regulate, Pet. Br. 48. Yet the Sixth Circuit had no trouble generating a list of nondiscriminatory paths to the same ends: for example, "requiring (1) a retailer's general manager to be a resident of the state, (2) both in-state and out-of-state retailers to post a substantial bond to receive a license, and (3) public meetings regarding the issuance of a license." Pet. App. 32a. Mechanisms like these ensure local familiarity and facilitate oversight without indulging in protectionism. Petitioner depicts Tennessee's discriminatory law as the product of "experiment[ing] with the best ways of regulating alcohol sales," Pet. Br. 47, but the bounds of permissible experimentation do not encompass "local parochialism." *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 43-44 (1980) (striking down state residency requirement for investment advisory businesses).

The practical realities of interstate retailing confirm that laws like Tennessee's cannot be justified by interests in oversight, control, and accountability.

First, as mentioned above, numerous states accomplish the same regulatory objectives as Tennessee without imposing any durational residency requirement. Consider the brief of thirty-five states and the District of Columbia, which is nominally filed in support of Petitioner but which notes on its first page that some of the signatory states "do not impose residency requirements but do

require that retailers have a physical presence in the State." Ill. et al. *Amicus* Br. 1. Likewise, Tennessee itself imposes no residency requirements on retailers selling beer and wine for off-premises consumption, *see* Tenn. Code Ann. §§ 57-5-103 (beer), 57-3-803 (wine), or, as noted above, those selling any alcoholic beverages—beer, wine, and liquor—for on-premises consumption in bars and restaurants, *id.* §§ 57-4-101, 102, 201.

Nor is there any reason to believe that single-state retailers are better equipped or more committed to lawful and orderly behavior than their interstate counterparts. Like single-state sellers, interstate retailers hire and train local employees to staff their stores and operate their cash registers. Those employees do not become any more or less familiar with their communities depending on whether their employer's officers, directors, and stockholders happen to live in Tennessee rather than Kentucky or North Carolina.

When deciding whom to hire, interstate retailers, like their single-state counterparts, must comply with state background check requirements for those who seek to sell alcohol at retail. *See, e.g.*, Ark. Code Ann. § 3-2-103 (authorizing background checks for retail license applicants) Minn. Stat. Ann. § 340A.412 (same). These requirements are both perfectly sensible and entirely unrelated to where a company's top executives live.

Once hired, interstate retailers engage in extensive and ongoing training to allow their

employees to comply with drinking-age laws by, among other things, requiring the presentation of valid identification and recognizing forgeries. In some cases, this training is responsive to state law. *See, e.g.*, Mont. Code Ann. § 16-4-1005 (requiring all licensees to ensure training); Or. Rev. Stat. Ann. § 471.341 (requiring employees found to have sold alcohol to minors to undergo training). In other cases, training may be intended to respond to the needs of local communities. Some interstate retailers that operate in university communities, for example, have designed targeted trainings to combat the higher prevalence of fake identification cards that may be expected in such environments.

In addition to their training programs, interstate retailers' experience operating within multiple regulatory environments may lead to the adoption of compliance mechanisms that draw on best practices from across jurisdictions. For instance, interstate retailers may post a single set of extensive warnings regarding the minimum age to purchase alcohol and the attendant legal penalties in order to ensure compliance with all state and local signage and posting requirements; such warnings will necessarily exceed the requirements in some jurisdictions. Interstate retailers may deploy point-of-sale locking mechanisms that require cashiers to enter an individual's date of birth prior to permitting the sale of alcohol. And many invest in cutting-edge technologies, such as advanced identification card scanners, to further target unlawful behavior.

When it comes to accountability, single-state and interstate retailers alike face the prospect of fines and license revocations for violations. *See, e.g.*, Neb. Rev. Stat. Ann. § 53-1,104 (authorizing "suspension, cancellation, or revocation" of license for repeated unauthorized sales); N.D. Cent. Code Ann. § 5-02-11 (authorizing revocation of license). Notwithstanding Petitioner's insinuations to the contrary, *see* Pet. Br. 48, a retailer's effectiveness at complying with drinking-age laws has nothing to do with where its directors, officers, or stockholders live, *see, e.g.*, *Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm'n*, 313 F. Supp. 3d 751, 765 (W.D. Tex. 2018), *appeal docketed*, No. 18-50299 (5th Cir. Apr. 16, 2018) (finding that the ten largest retailers in a class of alcohol permittees that included out-of-state corporations had fewer alcohol violations per store than did the ten largest retailers in a class of permittees that included only in-state companies).

If anything, interstate retailers are more able to pursue extensive internal accountability mechanisms. For instance, some interstate retailers deploy "secret shoppers" to audit whether employees are lawfully selling alcohol. Where violations are detected, they have required not just the offending employee but the entire team to undergo additional training. Interstate retailers may also utilize internal monitoring systems to track legal infractions and detect problem retail outlets.

What is more, interstate retailers with brick-and-mortar outlets in Tennessee are easy to find, inspect, and tax. *See, e.g.*, Minn. Stat. Ann. §§ 340A.402,

340A.414 (omitting residency from license requirements but requiring "establishment[s] holding a permit under this section [be] open for inspection"); N.J. Stat. Ann. §§ 33:1-25, 33:1-35 (adopting a similar approach). Their assets and investments in the state give retailers even greater incentives to ensure lawful and orderly operations. *See Wal-Mart Stores*, 313 F. Supp. 3d at 765 (finding that "the literature indicates public corporations tend to be very concerned with compliance and reputation"). And, to the extent a state deems it necessary, it can require retailers to post bonds. *Compare* N.Y. Alco. Bev. Cont. Law App. § 81.1 (requiring bonds for all license classes) *with* Liquor—Licenses, Sales, Samples, Bonding Requirements, 1989 Minn. Sess. Law Serv. 49 (repealing bond requirements for retail licenses previously codified at Minn. Stat. Ann. § 340A.412).

Oversight of the alcohol industry is an important objective, and reasonable regulatory minds can differ about the optimal approach. But that is not what is happening in Tennessee. The state has adopted a protectionist regime that shields local sellers from out-of-state competition. The Twenty-first Amendment puts an array of regulatory tools on the table. But the Commerce Clause makes clear that protectionism is not one of them.

CONCLUSION

This Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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